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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1180

HUGO A. PINELL, JOHN L. SPAIN, LUIS N. TALAMANTEZ, WILLIE TATE, DAVID JOHNSON, and FLEETA DRUMGO,
Petitioners,

VS.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITIONERS' REPLY BRIEF

STATEMENT OF FACTS OCCURRING SUBSEQUENT TO FILING OF PETITION FOR WRIT OF CERTIORARI

Subsequent to the filing of this petition on March 11, 1975, jury selection commenced in the criminal action underlying the instant proceeding. The jury selection phase is not expected to conclude for at least a month from the date of this Reply Brief. The trial itself is thus not expected to commence until some weeks after the conclusion of this Court's current term.

ARGUMENT

I

The trial court below found four groups—Blacks, Latin Americans, blue collar workers, and young people—to be "identifiable" in Marin County. The California Court of Appeal, whose decision respondent asks this Court not to review, specifically upheld this conclusion, saying that "(t)here is evidence to support the trial court's finding of four such classes in Marin."[1] The question of whether a group constitutes a "distinct class" in a particular community is one of fact, and not of law,[2] and this question of fact has been resolved against respondent. The lengthy argument by respondent in this area is thus irrelevant to, and only serves to obfuscate, the real issues raised in this petition for writ of certiorari.

II

The grand jury selectors, as respondent concedes, testified that they neither selected nor attempted to select any Latin Americans for the 1971 Marin County grand jury.[3] Respondent contends, however, that the selectors were justified in ignoring this group because it is relatively small in numbers and, in any event, a

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[1]Petition for Writ of Certiorari, App. A, pp. ii-iii.
[2]*Hernandez v. Texas*, 347 U.S. 475, 478 (1954).
[3]Response in Opposition, p. 32.

challenge to a grand jury cannot properly be based upon the exclusion of a group for only one year.[4]

Such reasoning ignores applicable decisions of this Court. Whatever the exact size of the Marin County Latin American community, the trial court determined that it constituted an "indentifiable" group, and the California Court of Appeal, citing *Hernandez v. Texas, supra,* sustained that finding (see *supra*). The selectors thus had an affirmative duty to "familiarize themselves fairly with the qualifications of the eligible jurors" from that class. *Cassell v. Texas,* 339 U.S. 289 (1950).

This they failed to do, as their own testimony conclusively established (R.T. 1047-48; 1167-68; 1249; 1367). Consequently, it is irrelevant whether there was proof of many years of discrimination (although such evidence was, in fact, introduced (R.T. 1907-08; 1917)):

> "Since the issue must be whether there is discrimination in the selection of the jury that has indicted petitioner, it is enough to have direct evidence based on the statements of the jury commissioners in the very case." *Cassell v. Texas, supra,* 339 U.S., at 290.

Petitioners recognize that they were not entitled to proportional representation on the 1971 grand jury, and therefore do not rest their claim simply upon the fact that no Latin Americans were represented on that particular panel. What petitioners are entitled to, and were denied, is the right to be indicted

[4] *Id.*, at 35-36.

by a grand jury from which a "cognizable" group is not systematically excluded.[5] *Hernandez v. Texas, supra,* 347 U.S., at 482.

CONCLUSION

It is respectfully submitted that a writ of certiorari should issue to review the decision of the California Court of Appeal.

Dated, June 3, 1975.

Respectfully submitted,

HOWARD MOORE, JR.,
CHARLES R. GARRY,
BENJAMIN J. DREYFUS,
LYNN S. CARMAN,
Attorneys for Petitioners.

Of Counsel:
MICHAEL B. DUFFICY,
JOEL KIRSHENBAUM.

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[5]Nor systematically *included.* Respondent has attached to its Response in Opposition the affidavit of Edmar D. Hicks, to support its contention that there was no discrimination against Blacks in prior years. Petitioners would observe that this affidavit is at best irrelevant. The grand jury selectors themselves considered their method of selection to be defective and changed it somewhat for 1971 (R.T. 1027-28; 1122; 1134-35; 1202; 926; 1124). Further, if a close examination of the Hicks affidavit is made, it shows discrimination against Blacks, rather than non-discrimination. For six of the ten years (including five consecutive years) covered by the affidavit, exactly one Black was nominated—a clear case of "systematic inclusion," a practice proscribed by this Court in *Cassell v. Texas, supra.* (In 1969 and 1965, the same person was nominated, Mrs. Juanita S. Cobb, an inconceivable result under a non-discriminatory selection system.) Any selection system which consistently limits the number of persons considered for grand jury service over so long a period of time cannot be found to be non-discriminatory.